

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

JUSTINO BERNANDINO	§	
v.	§	CIVIL ACTION NO. 6:06cv488
		(Crim. No. 6:05cr11)
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND ENTERING FINAL JUDGMENT

The Movant Justino Bernandino, proceeding *pro se*, filed this motion to vacate or correct his sentence complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Bernandino was convicted of possession with intent to distribute of at least five but less than 15 kilograms of a mixture or substance containing a detectable amount of methamphetamine. He entered a plea of guilty and received a sentence of 135 months, the minimum sentence within the range set out by the U.S. Sentencing Guidelines. He waived his right to appeal, and no appeal was filed.

On November 13, 2006, Bernandino filed a Section 2255 motion to vacate or correct his sentence. In this motion, he alleged that immediately after sentencing, he asked his attorney, Federal Public Defender Greg Waldron, to file an appeal, but Waldron told him that an appeal would have no merit (presumably because Bernandino had waived his right to appeal).

The Government filed a motion to dismiss Bernandino's motion to vacate sentence. After this motion was filed, the Fifth Circuit decided a case called United States v. Tapp, 491 F.3d 263 (5th Cir. 2007). In that case, the Fifth Circuit held that if the petitioner is able to demonstrate that

he requested an appeal, but none is taken, prejudice is presumed and he will be allowed to take an out-of-time appeal, regardless of whether he is able to identify any arguably meritorious grounds for appeal that would not be precluded by the terms of the appeal waiver.

In light of Tapp, the Magistrate Judge issued a Report on August 21, 2007, recommending that Bernandino's motion to vacate or correct his sentence be granted to the extent that he be allowed to take an out-of-time appeal. The Government has filed objections, but these are without merit.

The Court has conducted a careful *de novo* review of the pleadings in this case, the Report of the Magistrate Judge, and the Government's objections thereto. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Government's objections are without merit. It is accordingly

ORDERED that the Government's objections are overruled and the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Government's motion to dismiss (docket no. 9) be and hereby is DENIED. It is further

ORDERED that the Movant Justino Bernandino's motion to vacate or correct sentence is hereby GRANTED to the extent that Bernandino should receive an out-of-time appeal, as set forth by the Fifth Circuit in United States v. Tapp. Finally, it is

ORDERED that any and all other motions which may be pending in this action are hereby DENIED.

**So ORDERED and SIGNED this 28th day of September, 2007.**

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS  
UNITED STATES DISTRICT JUDGE**